HSBC BANK MALAYSIA BHD

v.

LOYALEX INDUSTRY SDN BHD & ORS

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL SUIT NO: 23-94-1999]
27 SEPTEMBER 2002

HIRE PURCHASE: *Breach of agreement - Default in payment of instalments - Damages - Whether a debt yet not due constituted unliquidated damages - Whether such debt capable of quantification without interference by court*

This was an appeal by the fifth defendant against the order of the learned senior assistant registrar entering final judgment in favour of the plaintiff, following the first defendant's breach of payment in respect of two hire-purchase agreements between the plaintiff and the first defendant, of which the fifth defendant was the guarantor. Although there was no dispute concerning the arrears already due, the fifth defendant contended that the plaintiff could only apply for interlocutory and not final judgment regarding the balance of the arrears (consisting of instalments as yet not due) as such a claim was not for a liquidated sum, but for unspecified damages.

Held:

[1] The fact that the debt was yet not due did not alter the liquidated character of the claim as only "whenever the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties, and is fixed by opinion or by an estimate", or "where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary", are damages said to be unliquidated. However, in the present case, there was nothing for the court to fix by an opinion or estimate, or to quantify or assess. Upon termination of the hire-purchase agreements, the fifth defendant became liable for liquidated damages, and in the present case, it was specified between the parties as being an amount equal to the unpaid balance and other sums payable under the hire-purchase agreements less the net proceeds of sale of the goods and appropriate rebate (if any), which required no investigation beyond mere calculation. (p 477 c-f)

[Appeal dismissed.]

Case(s) referred to:
Ban Hin Lee Bank Bhd v. Long Hua Corp Sdn Bhd & Ors [2000] 6 CLJ 1 ***(refd)***
Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***
Hawkins & Ors v. Bank of China 7 ACSR 349 ***(refd)***
Hyundai Shipbuilding & Heavy Industries v. Papadopoulos & Ors [1980] 1 WLR 1129 ***(refd)***
Hyundai ShipBuilding & Heavy Industries v. Pournaras [1978] 2 Lloyd's Reports 502 ***(refd)***
In the Matter of Action No 45 of 1908 v. In the Matter of the Execution Therein and of a Summons by the Green Island Cement Co Ltd [1912] 7 HKLR 10 ***(foll)***
Mahindar Singh v. Amanah Saham Pahang Bhd & Anor [1984] 1 CLJ 181; [1984] 2 CLJ (Rep) 205 ***(refd)***
Mortgage Acceptance Nominees Ltd v. Beatty [1991] NLSW LEXIS 9041 ***(foll)***
Moschi v. Lep Air Services Ltd & Ors [1973] AC 331 ***(foll)***
R v. AGAT Laboratories Ltd [1998] WCB 38 ***(foll)***
Re Fong Yaun Kwong, ex p Public Bank Bhd [1996] 4 MLJ 42 ***(refd)***
Real Marble Works Sdn Bhd v. Teh Khoon Chuan Trading Sdn Bhd & Ors [1999] 7 CLJ 182 ***(refd)***
Seaside Fish Haulers Inc v. REM Seafood Sales & Consulting Ltd [2002] ACWSJ 3531 ***(refd)***
Yue Wing v. David Sasson & Co LD [1907] 12 HKLR 171 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 3(1), O. 37

Other source(s) referred to:
English Supreme Court Practice 1997, para 6/2/4
Jowitt's Dictionary of English Law, 2nd edn, pp 544-545
Malaysian High Court Practice, vol 1, p 532
New Encyclopaedia, vol IV, p 102
12 Halsbury's Laws, 4th edn, para 1109

For the plaintiff - Kee Tong Kiak; M/s Chee Siah Le Kee & Partners
For the 5th defendant - Yeoh Cho Kheong; M/s Ranjit Ooi & Robert Low

Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:
This is the 5th defendant's appeal to judge-in-chambers against the order of the learned Senior Assistant Registrar entering final judgment in the sum claimed, against the defendants, in favour of the plaintiff.

It is not in dispute, (i) that by two "hire purchase agreements" dated 29 January 1996 and 17 July 1996, the plaintiff let and the 1st defendant hired those goods specified in those agreements, for a hiring period of 48 months commencing from the respective dates of the agreements, (ii) that with regard

to agreement dated 29 January 1996, the 1st defendant covenanted to pay to the plaintiff 48 monthly rental of RM33,074 each, and with regard to agreement dated 17 July 1996, the 1st defendant covenanted to pay to the plaintiff 48 monthly rentals of RM23.946 each, (iii) that by two contracts of indemnity and guarantee dated 29 January 1996 and 17 July 1996, the 2nd to 5th defendants promised "to jointly and severally indemnify the plaintiff against any loss resulting from the failure/refusal of the (1st defendant) to repay any advance made by (the plaintiff to the 1st defendant) and/or repay to (the plaintiff) all sums of money as shall from time to time or at any time hereafter become due and payable to (the plaintiff) under the various hire purchase and lease agreements concluded between (the plaintiff and the 1st defendant) or any variation or extension thereof and also the due observance and performance of all the other terms and conditions express or implied in the said agreement on the part of (the 1st defendant) to be observed or performed and also hereby jointly and indemnify (the plaintiff) and agree to keep (the plaintiff) indemnified from and against all loss, damages, costs and expenses suffered or incurred by (the plaintiff) by reason of any such breach or non-performance by the (1st defendant) of any terms and conditions on its part to be observed or performed and all actions claims and demands which may be instituted or made against (the plaintiff) in any way consequent upon or arising out of or incidental to the various hire purchase and lease agreements to be entered into by (the plaintiff) with (the 1st defendant) (see encl. 16, cl. 1 of either exh. HSBC8 or HSBC9).

It is also not in dispute, that the 1st defendant defaulted on the monthly rentals payable in respect of both agreements. As a matter of fact, Mr Yeoh Choo Kong for the 5th defendant even submitted that summary judgment "could be entered" for the arrears. But with regard to the claim above the arrears, Mr Yeoh contended that the plaintiff could only apply for interlocutory and not final judgment. Mr Yeoh argued as follows. "Arrears were already due, and the claim (for the same) is therefore for a liquidated sum. The claim for the balance above the arrears is not a claim for a liquidated sum. It should be a claim for unspecified damages ... (final) judgment cannot be entered just like that; there ought to be an application under O. 37 for assessment of damages. In the case of the instalments as yet not due, it is not a debt and should not be treated as such ... the plaintiff's claim is part debt and part damages ... since judgment was wrongly entered, then it should be set aside." To illustrate his point, Mr Yeoh said that if 36 hire instalments are payable and ten instalments are in arrears, a plaintiff should claim for ten instalments as a debt and for the balance 26 instalments as damages.

Mr Kee Tong Kiak for the plaintiff disagreed. Pointing to p. 75 of encl. 16, Mr Kee contended that the obligation of the 5th defendant was to pay all sums

or moneys as shall from time to time become due and payable. Mr Kee further contended, that the statement of account is conclusive of the indebtedness, that the claim against the 5th defendant is for a liquidated sum, and that that amount was ascertained when final judgment was entered against the 1st defendant. Mr Kee further submitted that a claim against a guarantor is a claim for a liquidated sum (counsel submitted the Australian case of *Hawkins and Ors v. Bank of China* 7 ACSR 349, where the obligation covered by the guarantee was an amount of A$5m, being the balance of moneys owing on the maturity of certain bills of exchange for which two companies were jointly and severally indebted to the bank, and where it was unanimously held by the Court of Appeal that it was a situation where the subject of the guarantee, *viz* the payment of a debt or sum of money, had accrued so that the bank, on default of the principal debtors, could sue the guarantor for the debt or sum of money, and that the claim against the guarantor must be regarded as a claim for a liquidated sum rather than a contingent liability to pay damages).

It is unmistakable that the reasoning for to say that the claim for the remaining instalments is not for a liquidated sum, was made out as follows. According to Mr Yeoh, that which is already due and owing is a debt, and a claim for arrears "is therefore for a liquidated sum", but that which is yet not due is not a debt and a claim for the remaining instalments is therefore not for a liquidated sum. In other words, according to Mr Yeoh, only arrears could be considered as liquidated. Now regardless of the substance in that argument, it is also indisputable that Mr Yeoh in his reasoning had assumed that the remaining instalments were not due. But could it be assumed that the remaining instalments were not due and payable? The obligation of the 1st defendant was to pay instalments as they fall due. But forthwith upon termination of the hire purchase agreements by the plaintiff, the obligation of the 1st defendant was to pay the unpaid balance of the hire purchase price and other sums payable under the hire purchase agreements (cl. 15.2 of the hire purchase agreements). Therefore, although it was agreed that instalments fall due on particular dates, it was also agreed that the unpaid balance fall due upon termination of the hire purchase agreements by the plaintiff. Now both hire purchase agreements were terminated by the plaintiff on 22 June 1999 (encl. 16 exhs. HSBC12 and HSBC13). Accordingly, the unpaid balance (and that would include the arrears and remaining instalments) fell due and payable on 22 June 1999. Indeed, upon termination of the hire purchase agreements on 22 June 1999, "the primary obligation ... to pay instalments was converted ... into a secondary obligation ... to pay the balance of the whole debt immediately" (see speech of Lord Simon of Glaisdale in *Moschi v. Lep Air Services Ltd & Ors* [1973] AC 331). Plainly, it could not be argued that the remaining instalments were not due and payable.

And such arrears (in respect of accrued instalments, see *Hyundai ShipBuilding & Heavy Industries v. Pournaras* [1978] 2 Lloyd's Reports 502, where it was held that the fact that the contract had come to an end did not free the sureties from their liability in respect of accrued instalments, and *Hyundai Shipbuilding & Heavy Industries v. Papadopoulos & Ors* [1980] 1 WLR 1129, where it was held that the exercise of the contractual right to cancel did not destroy the creditor's right to recover the arrears) and remaining instalments were due from the 5th defendant as well. As said, the 5th defendant promised to answer for the failure/refusal of the 1st defendant to pay the instalments or unpaid balance. "There (was) no prestable obligation unless and until the 1st defendant failed to pay" (see speech of Lord Reid in *Moschi v. Lep Air Services Ltd & Ors*). But upon the 1st defendant's failure to perform its primary or secondary obligation, the 5th defendant became liable to pay the instalments or unpaid balance, by reason of the 1st defendant's breach and also because "the creditor can recover from the guarantor as damages for breach of the guarantee whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure ... (as) the debtor's liability to the creditor is also the measure of the guarantor's" (*Moschi v. Lep Air Services Ltd & Ors* per Lord Diplock). And that amount of damages suffered by the plaintiff to be recovered from the 5th defendant was clearly specified by the plaintiff. Yet it was argued, that the claim for the remaining instalments is not for a liquidated sum.

It is said that "the nature of the cause of action must be stated with sufficient particularity to allow a determination that it is a liquidated claim" (*Seaside Fish Haulers Inc v. REM Seafood Sales & Consulting Ltd* [2002] ACWSJ 3531). As to the test to be applied, the English Supreme Court Practice 1997 at para 6/2/4 formulated it thus:

> A liquidated demand is in the nature of a debt, ie, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes 'damages'.
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> The words 'debt or liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure (*Knight v. Abbot* [1883] 10 QBD 11). A claim for a stated sum of money paid to the defendant for a consideration which has failed is a recognised form of a liquidated demand.

That the above is the test is trite; it is the test consistently applied in the local courts (see *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127; *Mahinder Singh v. Amanah Saham Pahang Bhd*

& Anor [1984] 1 CLJ 181; [1984] 2 CLJ (Rep) 205; *Real Marble Works Sdn Bhd v. Teh Khoon Chuan Trading Sdn Bhd & Ors* [1999] 7 CLJ 182; *Re Fong Yaun Kwong, ex p Public Bank Bhd* [1996] 4 MLJ 42; *Ban Hin Lee Bank Bhd v. Long Hua Corp Sdn Bhd & Ors* [2000] 6 CLJ 1) and adopted by the *Malaysian High Court Practice* (see vol 1 p. 532). It was so urged upon the court, but the test to be applied is not that the debt must be already due. If a debt is not due, the cause of action has not accrued. But it does not mean that a claim for a debt yet not due is therefore for an unliquidated sum. The debt may or may not be due, but a claim for a debt in the sense of a specified sum already ascertained or capable of being ascertained as a mere matter of arithmetic without requiring further investigation, is nonetheless a claim for a liquidated sum. The fact that the debt is yet not due does not alter the liquidated character of the claim. For only "whenever the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties, and is fixed by opinion or by an estimate" (*New Encyclopaedia* (vol IV p. 102), *Jowitt's Dictionary of English Law*, 2nd edn, pp 544-545; and cited in *Yue Wing v. David Sasson & Co LD* [1907] 12 HKLR 171, *In the Matter of Action No. 45 of 1908 v. In the Matter of the Execution Therein and of a Summons by the Green Island Cement Co Ltd* [1912] 7 HKLR 10; and *R v. AGAT Laboratories Ltd* 38 WCB (2d) 10 February 27 1998) or "where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary" (*12 Halsbury's Laws*, 4th edn para 1109), are damages said to be unliquidated. But there is nothing for the court to fix by an opinion or estimate or to quantify or assess in the present case. Upon termination of the hire purchase agreements within the provisions of cl. 15.1, the 5th defendant became liable for liquidated damages (*Mortgage Acceptance Nominees Ltd v. Beatty* [1991] NLSW LEXIS 9041), and in the present case it was specified between the parties in cl. 15.2 as being an amount equal to the unpaid balance and other sums payable under the hire purchase agreements less the net proceeds of sale of the goods and appropriate rebate (if any), which amount requires no investigation beyond mere calculation.

With respect, there is no merit in this appeal. There is no issue or question in dispute which ought to be tried, and there is no reason to say there ought to be a trial of the claim (see O. 14 r. 3(1) of the Rules of the High Court 1980). Hence, this appeal to judge-in-chambers is dismissed with costs.